NO. 80081-2

SUPREME COURT OF THE STATE OF WASHINGTON

ARMEN YOUSOUFIAN,

Respondent,

v.

THE OFFICE OF RON SIMS, KING COUNTY EXECUTIVE, a subdivision of KING COUNTY, a municipal corporation; THE KING COUNTY DEPARTMENT OF FINANCE, a subdivision of KING COUNTY, a municipal corporation; and THE KING COUNTY DEPARTMENT OF STADIUM ADMINISTRATION, a subdivision of KING COUNTY, a municipal corporation,

Petitioners.

ANSWER TO BRIEFS OF AMICUS CURIAE

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I. INTRODUCTION

In its decision of January 15, 2009, a majority of the Court articulated a multi-factor test for determining PRA penalties under RCW 42.56.550(4). Amicus Curiae State of Washington argues that the Court should eliminate those factors that do not reach an agency's culpability. Amicus Curiae Allied Daily Newspapers argues that the requestor's economic loss should not be considered as a factor and that the Court should require trial courts to start their analysis of penalties at the middle of the penalty range.

Rather than bind trial court discretion in the way suggested by Allied Daily Newspapers, this Court should adopt a refined multi-factor framework consisting of factors necessary to guide trial courts. These factors should be clear, fair, easy to apply, and aimed at encouraging agencies to comply with the Public Records Act.

II. ARGUMENT

A. In adopting a PRA framework for penalty determination, this Court should include factors probative of agency culpability.

On its further review of this case, King County asks the Court to establish an analytical framework that provides clear guidance to

trial courts in the application of penalties under the PRA. The main purpose of the penalty provision of the PRA is to encourage agencies to comply with the requirements of the Act. The primary consideration in applying penalties under the Act is the presence or absence of an agency's bad faith.

A secondary factor is the presence of any culpability of the agency short of bad faith. The third relevant factor is the calculation of a penalty amount sufficient for purposes of punishment and deterrence.

Under this analysis, if bad faith is not shown, the trial court analyzes the second factor -- agency culpability short of bad faith. This factor generally encompasses unintentional wrongdoing, and is broad enough to include the considerations enumerated by the Court in its latest decision. *See Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 458-59, 200 P.3d 232 (2009). Indeed, considerations such as the sufficiency of an agency's public disclosure system, the adequacy of training, agency assistance to the requestor, the promptness of an agency's response, its strict compliance with PRA procedural requirements and exceptions, and the reasonableness of claimed exemptions all fall squarely within this factor. The Court could enumerate these considerations in its decision in order to

provide guidance to trial courts, leaving their proof to the litigants depending on the facts and circumstances of each individual case.

The third factor (amount sufficient for purposes of punishment and deterrence) naturally flows from the trial court's assessment of the first two. This factor may also include considerations such as the size of the agency and the potential for public harm.[1]

This framework is consistent with the Court's latest decision, preserves the flexible discretionary standard of the penalty

[1] When reviewing whether a penalty is sufficient for purposes of punishment and deterrence, appellate courts should consider the entire penalty amount, not just the per-day penalty assessed under RCW 42.56.550(4). *See Yousoufian*, 165 Wn.2d at 472 (Owens, J., dissenting) (deterrent effect can be effectively evaluated based on total award). The total penalty is calculated by multiplying the number of penalty days (a factual determination) by the per day penalty (a discretionary decision). *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438-39, 98 P.3d 463 (2004). Trial courts may determine the number of penalty days based on (1) the days an agency delays response to an individual request; (2) the number of days specific records are withheld; or, as in this case, (3) the trial court may create groups of documents responsive to a single request, and determine the number of days each group was wrongfully withheld. The number of penalty days may vary substantially depending on the specific method chosen. Trial courts should retain the discretion to reduce the per-day penalty when it selects method (2) or (3), above, and the result is a penalty period significantly larger than it would be under method (1). *See Yousoufian*, 152 Wn.2d at 437 (where plaintiff could have achieved disclosure of records in a more timely fashion, trial court may, in its discretion, decrease the per-day penalty during this period); *Yousoufian*, 165 Wn.2d at 470 (Owens, J., dissenting) (trial court not required to ignore total number of penalty days when assessing a daily penalty).

provision, and provides clear, meaningful guidance for trial courts to follow in imposing penalties consistent with agency culpability.[2]

B. In determining penalties under the PRA, trial courts should have discretion to achieve the goals of the Act under the specific facts and circumstances of a given case.

Amicus Curiae Allied Daily Newspapers argues that the Court should require the trial courts to begin their penalty analysis at the middle of the penalty range. This bright-line rule, however, has no support in the PRA and would leave little room for good faith decisions by an agency to withhold records. Instead, the trial court should be given discretion to determine the appropriate penalty in an individual case, including beginning at the start of the penalty range and increasing the penalty as the trial court finds factors indicating agency culpability.

Starting at the beginning of the penalty range makes sense in the context of this strict liability statute. Under the Public Records Act, a requestor is entitled to the minimum daily penalty even absent a showing of culpability. Even where an agency relies in good faith on a statutory exemption, it must nonetheless be penalized if a record

[2] For clarity and ease of application, the Court should state the three factors followed by the considerations relevant to each, without designating the factors as aggravating or mitigating.

is erroneously withheld. *Amren v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997); *King County v. Sheehan,* 114 Wn. App. 325, 355, 57 P.3d 307 (2002) (penalty of at least $5 per day mandatory where agency erroneously withholds public record, whether or not agency acted in good faith reliance on statutory exemption). Thus, an agency may act in good faith even though it erroneously denies access to a public record.

Indeed, it has long been the rule in this state that public officials are presumed to act within the limits of their authority and in good faith. *State ex rel. Hodde v. Superior Court of Thurston County,* 40 Wn.2d 502, 515, 244 P.2d 668 (1952);[3] *Blade v. Town of La Conner,* 167 Wash. 403, 408, 9 P.2d 381 (1932) (it is presumed that public officers act in good faith); *Musselman v. Department of Social and Health Services,* 132 Wn. App. 841, 852, 134 P.3d 248 (2006) (court presumes public officials act in good faith). The burden of impeaching their actions rests on the attacker. *Hodde,* 40 Wn.2d at 515; *Blade,* 167 Wn.2d at 408.

Thus, the mere fact of a violation of the PRA carries no presumption of a particular culpability level. *See Fenimore v. Donald*

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[3] This court recently relied on the *Hodde* decision in *Brown v. Owen*, 165 Wn.2d 706, 724, 206 P.3d 310 (2009).

M. Drake Const. Co., 87 Wn.2d 85, 88, 549 P.2d 483 (1976) (negligence is never presumed). It is the requestor who bears the burden of proving the level of agency culpability. *See Hansen v. Friend,* 118 Wn.2d 476, 479, 824 P.2d 483 (1992) (plaintiff must establish actionable negligence). When an agency erroneously denies a record, good faith is presumed, and the requestor bears the burden of proving the degree of agency culpability.

For these reasons Allied is incorrect in asserting that trial courts should begin the penalty analysis in the middle of the $5 to $100 range under RCW 42.56.550(4). *See* Allied brief, at 16-18. Allied would have the Court presume significant agency culpability from the mere fact of a violation. This is fundamentally inconsistent with the structure of the PRA and the presumption of good faith.

Instead, when an erroneous withholding is shown, the trial court should be free to begin at the minimum daily penalty amount of $5 under the statute. The court can then "increas[e] the penalty based on an agency's culpability. . ." (*see Yousoufian*, 152 Wn.2d at 435), with the highest penalties reserved for intentional wrongdoing, or bad faith.

C. The Court should give the trial court discretion to apply the penalty framework on remand.

As the Court of Appeals recognized in *Sheehan*, the PRA's penalty provision "grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges." *Sheehan,* 114 Wn. App. at 350. The appellate court's function is to review claims of abuse of trial court discretion, not to exercise that discretion itself. *Id.* at 350-51. *See also Yousoufian*, 165 Wn.2d at 462-64 (Chambers, J., concurring); 165 Wn.2d at 466-67 (Alexander, C.J., concurring/dissenting); 165 Wn.2d at 467 (Owens, J., dissenting).

Consistent with these principles, King County asks the Court to announce the proper penalty framework and emphasize that penalty determination is a function of the trial court, subject only to review for abuse of discretion. Accordingly, the Court should allow the trial court discretion to determine the penalty on remand without suggesting the appropriate penalty. *See Yousoufian*, 165 Wn.2d at 466-67 (Alexander, C.J., concurring/dissenting). The trial court's exercise of discretion should be limited only by the prior determination that King County was grossly negligent in handling Mr. Yousoufian's requests.

D. This Court properly granted King County's motion to strike amici's attempt to introduce materials outside the record.

Before this Court and the Court of Appeals, Allied sought to use ER 201 as an avenue to introduce new material at the appellate level. The Court granted King County's motion to strike these materials (*see Yousoufian*, 165 Wn.2d at 462, note 15), and it should adhere to this decision on rehearing.

Allied previously cited to websites, audits, surveys and unpublished trial court decisions, all for the proposition that Washington government agencies fare poorly in complying with public record laws. None of these items were introduced at trial. Neither King County nor the trial court had the opportunity to evaluate the validity or credibility of these sources. The Court correctly granted King County's motion to strike these materials.[4]

Allied contends that Petitioners opened the door to this practice by citing two newspaper articles in prior briefing, which called Judge Hayden's $123,780 penalty award the largest in state history.

[4] Allied's position on this issue (*see* Allied brief, at 14-16) is untenable for at least two reasons. First, it encourages parties to use amici as a conduit to introduce evidence that was not or could not have been admitted at trial. Second, it will burden appellate courts by placing them in the role of fact-finders, requiring evaluation of new information for the first time on review. This burden will only increase when answering parties respond by offering their own new material for

See Allied Brief, at 14. King County's previous citation to these articles for a single, undisputed point pales in comparison to Allied's far more ambitious efforts here. In any event, neither Yousoufian nor Allied properly objected to King County's prior briefing, and cannot do so for the first time now.

In its current brief, Allied appears to have abandoned its efforts to introduce the websites, audits and surveys, arguing only that trial court decisions should be considered. *See* Allied brief, at 14-16. The State, in its amicus brief, has also cited to a trial court decision. *See* State's brief, at 6, note 1.

Although ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review. *King County v. Central Puget Sound Growth Management Hearings Board, et al.*, 142 Wn.2d 543, 549 n. 6, 14 P.3d 133 (2000). In other words, RAP 9.11 applies in addition to the normal judicial notice standard. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

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the appellate court's consideration. An adoption of Allied's position will require the appellate courts to step well outside their traditional role in future cases.

The court cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. *Id.* And it is improper to cite unpublished opinions as authority at either the trial or appellate levels of our courts. *See Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005).

The trial court decisions cited by both the state and Allied are not properly before the court, and should be disregarded.

III. CONCLUSION

For the foregoing reasons, Petitioners ask the Court to adopt the three-factor analysis suggested in Section (A) of this Answer, and remand the case to the trial court with instructions to apply these factors and determine a penalty consistent with the law of the case.

DATED this 10th day of September, 2009.

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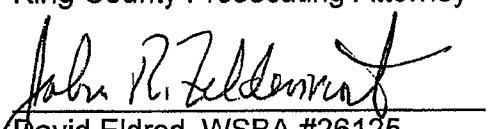

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